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In the Supreme Court of the United States

October Term, 1983

MARY ANNE ROBERTSON, *Petitioner,*

vs.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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34 pp

QUESTION PRESENTED

WHETHER FLORIDA'S UNLIMITED INQUIRY INTO BAR APPLICANTS' PAST PSYCHOLOGICAL CONSULTATIONS VIOLATES THEIR FEDERAL RIGHT TO PRIVACY?

PARTIES TO THE PROCEEDING

Petitioner in this case is Mary Anne Robertson.

Respondent is the Florida Board of Bar Examiners.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Florida appears at 443 So.2d 77 (Fla. 1983) and is at A. 1. The companion opinion, *Florida Board of Bar Examiners Re: Applicant*, is reported at 443 So.2d 71 (Fla. 1983) ("*Board of Bar Examiners I*") and is at A. 3-18.

JURISDICTION

The Supreme Court of Florida issued its decision November 10, 1983. Petitioner Mary Anne Robertson ("Robertson") timely filed her Motion for Rehearing pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, which motion was denied by the Supreme Court of Florida on February 9, 1984. (A. 2). This petition for writ of certiorari has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there-

of; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 23 of the Florida Constitution provides:

> *Right of Privacy.* Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Article V, Section 15 of the Florida Constitution provides:

> *Attorneys; admission and discipline.* The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

Section 90.503(2) of the Florida Statutes provides:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

Article III of the Florida Rules of the Supreme Court Relating to Admissions to the Bar, provides in pertinent part:

> B. CHARACTER AND FITNESS REQUIREMENTS
>
> *Section 2.* No person shall be recommended by the Florida Board of Bar Examiners to the Supreme Court of Florida for Admission to The Florida Bar unless such person first produces satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession and that such person is otherwise fit to take the oath and perform the obligations and responsibilities of an attorney.
>
> * * *

Section 4. (a) Any applicant who is dissatisfied with the Board's recommendation concerning his or her character, fitness or general qualifications, may, within sixty (60) days after notice of the Board's recommendation, file with the Board a petition for reconsideration. . . .

Item 28 of the Applicant's Questionnaire and Affidavit provided by the Florida Board of Bar Examiners states:

(a) Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

(b) Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? ..... If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)

I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

(A. 20).

The authorization and release form provided by the Florida Board of Bar Examiners states:

I, ..., having filed an application with the Florida Board of Bar Examiners and fully recognizing the responsibility to the Public, the Bench, and the Bar

of this State lodged with the Florida Board of Bar Examiners by the Supreme Court of Florida under the Constitution of the State of Florida to determine that only those of high character and ability are admitted to The Bar of Florida, hereby authorize and request every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution having control of any documents, records or other information pertaining to me relevant to my good moral character and fitness to perform the responsibilities of an attorney, to furnish the originals or copies of any such documents, records and other information to said Board, or any of its representatives, and to permit said Board, or any of its representatives, to inspect and make copies of any such documents, records and other information including but not limited to any and all medical reports, laboratory reports, X-rays, or clinical abstracts which may have been made or prepared pursuant to, or in connection with, any examination or examinations, consultation or consultations, test or tests, evaluation or evaluations, of the undersigned.

I hereby authorize all such persons as set out above to answer any inquiries, questions, or interrogatories concerning the undersigned which may be submitted to them by the Florida Board of Bar Examiners or its authorized representative, and to appear before said Board, or its authorized representative, and to give full and complete testimony concerning the undersigned, including any information furnished by the undersigned. I hereby relinquish any and all rights to said reports, including but not limited to clinical abstracts, consultations, evaluations, or any other information incident in any way to cooperation with

the Florida Board of Bar Examiners, or its authorized representative, and fully understand that I shall not be entitled to have disclosed to me the contents of any of the foregoing.

I hereby release and exonerate every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Florida Board of Bar Examiners. The undersigned further waives absolutely any privilege ..he may have relevant to h..... good moral character and fitness to perform the responsibilities of an attorney under Sections 90.242 and 490.32, Florida Statutes.

(A. 8-9).

STATEMENT OF THE CASE

This case actually began more than six years ago when Mary Anne Robertson, the former Sister Charles Ellen,[1] consulted a psychiatrist several times because she was suffering from a mild depression. With the aid of this counseling, she discovered that she had reached a "transitional" phase in her life. Based upon intensely personal and highly intimate considerations, she determined to pursue a new vocation: the practice of law.

Robertson enrolled in a Florida law school and applied for admission to The Florida Bar. She did not respond to Item 28(b), a question on the Applicant's Questionnaire and Affidavit (the "Application") which on its face appeared to require both sweeping disclosure of all past "regular" consultations with any psychologist or psychiatrist and an unconditional waiver of the right to maintain the confidentiality of the substance of such consultations, irrespective of whether it would have any relevance to the applicant's fitness to practice law.[2] Rather than consent to the gratuitous disclosure of information she considered highly personal, Robertson diligently corresponded with

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1. Robertson left the convent some six years prior to the time she sought the counseling at issue here.

2. The text of the question is reproduced in full at p. 4 *supra;* the text of the waiver and release form is at pp. 4-6, *supra.* Consultations were to be disclosed if the applicant had had two within any 12 month period. The inquiry was unlimited in time or scope. For example, if an applicant had seen a child psychologist three times in one year as a young child because of "bed-wetting" such "treatment" was to be disclosed. No exceptions were created for highly intimate, but irrelevant, problems such as impotency, frigidity or general marital problems.

the Florida Board of Bar Examiners (the "Board")[3] for a period of two-and-a-half years, attempting first to have the terms of the question defined or modified, and finally, to have the question waived or omitted from the Application. Despite its acknowledgement of the legitimacy of her claim, the Board persisted throughout in refusing her requests that it address the privacy issue she raised, insisting that it would not even initiate the processing of her Application if she did not respond in full.[4] Therefore, on April 27, 1981, Robertson finally instituted an original proceeding in the Florida Supreme Court, pursuant to Article III, Section 4, Rules of the [Florida] Supreme Court Relating to Admissions to the Bar (the "Admission Rules"), seeking review of the Board's decision. Some two-and-a-half years later, on November 10, 1983, the Florida Supreme Court denied, in a one-line opinion, Robertson's petition for review. On February 9, 1984, over five years after she applied for admission to the Bar, her request for rehearing was similarly denied. Robertson now files this petition

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3. The Florida Board of Bar Examiners consists of twelve members of The Florida Bar and three lay people. The Board of Governors of The Florida Bar recommends appointees from which the Florida Supreme Court selects the attorney members of the Board. A joint committee of the Board of Governors and the Board of Bar Examiners recommends those appointees from which the Court selects the lay members of the Board.

4. One reason the Board acknowledged a serious question existed with respect to the applicant's privacy right was the recent addition of a strong right to privacy provision to the Florida Constitution, reproduced at p. 2, *supra*. In fact, the Board formed a special committee to study the matter, but ultimately stated a court decision was necessary to resolve the issue. The Board's ruling that it would not commence processing Robertson's application until she complied appears peculiarly coercive and inappropriate in this context. Because The Florida Bar characteristically requires six to eight months to conduct its character investigation, early processing is critical to applicants. As the facts recounted *infra* aptly demonstrate, the Board has conducted itself throughout with an institutional arrogance and insensitivity.

for a writ of certiorari to the Supreme Court of Florida in a final attempt to obtain the review of her cause she has yet to receive.

A. The Application Process.

On January 15, 1979, when she submitted her Application to the Board in accordance with the Admission Rules, Robertson was a law student completing her legal education at the Nova University Center for the Study of Law in Fort Lauderdale, Florida. She responded accurately and completely to all questions on the extensive Application save one. That question, Item 28(b), asks:

> Have you ever received REGULAR treatment for amnesia, or *any form of* insanity, *emotional disturbance,* nervous or mental disorder? .....
>
> Yes or no
>
> If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (*Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)*
>
> I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

(A. 20) (emphasis added).

While the question appears to require complete disclosure of the details of all past psychological consultations and an unconditional waiver of the psychotherapist-patient privilege, the language is somewhat abstruse; consequently, Robertson requested clarification of certain terms. She also asked for an explanation of the nature of

the inquiries the Board might make in its investigation of the information disclosed.[5] (A. 20).

By letter on February 5, 1979, the Board (i) ordered Robertson to answer Item 28(b), and (ii) informed her that:

> The Board spent many hours deliberating on what constituted treatment under the wording of Item 28(b) and finally decided to define, for the purposes of the Board's application form, regular treatment as more than two consultations with a psychologist, psychiatrist or other medical practitioner within any twelve month period.

(A. 21).

The Board neither explained the rationale behind this definition nor offered a definition of "emotional disturbance" as Robertson had requested. It did not suggest any types of psychological problems which could reasonably be excluded from inquiry. The Board did not provide any explanation of the inquiries it might conduct on the basis of the information obtained from Item 28(b)—although the Board did make it clear the information would be used to investigate the nature of any consultation. (A. 21-22).

On February 28, 1979, Robertson submitted in response an "Amendment" to her Application. There she stated that she objected to Item 28(b) because it violated her right to privacy, and declined to respond to the Item. (A. 23).

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5. Robertson did, however, answer Item 28(a), which asked only whether the Applicant had ever been *diagnosed* as having one of the "afflictions" listed in Item 28(b). (A. 20). Robertson also answered all questions on the Application relating to the use of drugs or alcohol, her moral character, and her mental competency (including Item 27 which asks whether the applicant has ever been declared legally incompetent). (A. 19-20). Robertson was never diagnosed as a depressive or as suffering from clinically-defined depression.

The Board summarily rejected the Amendment claiming "[t]he Supreme Court of Florida recently ruled in a similar situation that an applicant must file the required information under Item 28 before processing of the application by the Board could continue." (A. 24). The Board returned Robertson's Application unprocessed on March 20, 1979. (A. 25). The early initiation of the "processing" procedure is important because the Board routinely requires six to eight months to conclude its exhaustive "character and fitness" investigation of applicants, and delay in the completion of this processing can substantially impair an applicant's ability to secure employment.

Robertson requested a citation for, or access to, the referenced decision of the Supreme Court of Florida. (A. 30). The Board then informed her it had "checked the appropriate order concerning the recent Court decision [referred to in the earlier letter] . . . and [found] that the wording [did] not clearly tell [the Applicant] what [the Board had] indicated." (A. 26).[6] Robertson requested clarification of this response (A. 27), and the Board replied by ordering Robertson to either answer Item 28(b) or petition the Board, even though "the Board [had] consistently held that [Robertson] must complete the Application in its entirety." (A. 28).

On August 4, 1979, Robertson made a second request for clarification. (A. 29-31). She listed again precise questions she needed the Board to answer before she could respond to Item 28(b). (A. 31). The Board's only response was to instruct Robertson to "use [her] own best judgment" in responding to Item 28(b). (A. 32). Should

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6. Counsel has been unable to locate such case, and of course, the Florida Supreme Court made no reference to this "precedent" in its opinion in *Board of Bar Examiners I.*

she wish to petition, the Board informed her, she could at her option direct such a petition either to the Board or directly to the Florida Supreme Court.

Thus, on September 24, 1979, Robertson petitioned the Board for a waiver of the requirement that she respond to Item 28(b). (A. 33-34). She further requested that the Board consider rewording the question or omitting it from the Application altogether. The term "emotional disturbance" was ambiguous and the entire inquiry discriminatory. Moreover, the question as worded did not seem properly to further any compelling state interest. With her petition, Robertson enclosed for the Board a survey she had conducted of applications in other states which demonstrated Florida's question to be far more intrusive than that of other states[7] generally. (A. 45-49).

One month later, the Board's only response was to inform Robertson that her Application could not be processed until Item 28(b) was completed. (A. 35).

On December 12, 1980, counsel for Robertson wrote a lengthy "lawyer's letter" to the Board on her behalf requesting a review of the appropriateness of Item 28(b). (A. 36-44). The letter pointed out that Item 28(b): (i) was impermissibly vague and overbroad; (ii) as formulated served no valid or articulated state purpose; (iii) violated Robertson's statutory and common law privilege to keep confidential her psychological treatments; and (iv) violated her right to privacy under Article I, Section 23 of the Florida Constitution and under the Fourteenth Amendment of the United States Constitution. The Board made no

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7. Counsel for Robertson has recently conducted a survey of the bar applications in the fifty states and the District of Columbia. This survey is not at this time complete and for this reason is not reproduced in the Appendix. Results obtained thus far are discussed *infra* at pp. 23-25. Counsel intends to file a Supplemental Appendix containing all pertinent survey information as soon as such survey is complete.

response to any of the points raised by counsel, but the matter was again taken under consideration and referred to the Board's attorney. (A. 50).

On February 16, 1981, counsel for Robertson was informed that the Board had decided to form a "special committee to review the entire application in view of . . . concerns and considerations of the recently enacted Right to Privacy amendment to the Florida Constitution." (A. 51). The Board also informed counsel that it would nevertheless require Robertson to complete Item 28(b) before it would process her Application.

Hence, on March 12, 1981, counsel for Robertson resubmitted the Application on her behalf with the request that the Board process it, "with completion of Item 28(b) being dependent on the special committee's action." (A. 53). On April 17, 1981, counsel advised the Board of Robertson's intention to petition the Florida Supreme Court to review the Board's refusal both to amend the Application and to initiate its processing pending the special committee's action. (A. 55). To avoid unnecessary administrative delay in admission to The Florida Bar, Robertson requested that the Board process the Application pending a final decision of the Florida Supreme Court. (A. 55).

The Board subsequently entered its final ruling, again refusing to initiate processing of Robertson's Application until she completed Item 28(b). (A. 57). The Board noted that the special committee would not act in the near future, and that, in any event, the Board would require a judicial construction of the privacy right asserted before it could reach any decision. (A. 57). At no time did the Board attempt to explain the purpose of Item 28(b), or explain why it would not initiate processing of Robertson's Application until after she had answered Item 28(b).

On May 29, 1981, Robertson filed an Amendment to her Application responding to Item 28(b) because the Board refused to process her Application pending her appeal to the Florida Supreme Court. As the Board was well aware, its delay in processing her Application would have concomitantly delayed her admission to The Florida Bar and prevented her from earning a livelihood in her profession. In her Amendment, Robertson acknowledged that she had had consultations with a psychiatrist during the period prior to her decision to enter law school when she was mildly depressed, and she disclosed his name and address.

Thus, for two-and-a-half years Mary Anne Robertson conscientiously pursued her request for limitations on the intrusive scope of Item 28(b) with the Florida Board of Bar Examiners. She identified fundamental state and federal constitutional objections to the question she repeatedly refused to answer. During the entire period, the Board did no more than acknowledge the problem Robertson raised and attempt to coerce her by evasion and delay to abandon her rights.

B. The Proceedings In The Florida Supreme Court.

On April 27, 1981, Robertson petitioned the Florida Supreme Court for review of the Board's decision. She sought (i) reversal of the Board's decision that Item 28(b) need not be deleted; (ii) an order prohibiting the Board from using the privileged information she disclosed; (iii) a return of fees assessed her for "late" filing of her Application; and (iv) a declaration of her rights. She argued that Item 28(b) was impermissibly vague and overbroad. Because the question encompassed *all* past "regular" consultations, without regard to subject matter or chronological relevancy, it would gratuitously unearth very private

information not material to the Board's legitimate fitness inquiry. Item 28(b) was thus *unnecessarily* intrusive and violated both her state and federal constitutional rights to privacy.

Robertson argued that instead of adopting the "least intrusive" means and most narrowly drawn regulations for establishing fitness, as constitutionally required, the Board had adopted the *broadest* and *most intrusive* means. Its inquiry, not limited in time or scope, thus intruded into the most private aspects of her life, thereby affecting personal decisions which, constitutionally, were hers alone. She also noted that The Florida Bar made no similar disclosure demands upon practicing lawyers.

In response, the Board conceded that its right "to inquire and to investigate personal matters in an applicant's background is, of course, not unlimited." (Brief of Florida Board of Bar Examiners at 3). And the Board acknowledged at least that "a rational connection must exist between any qualification restriction on an applicant's admission and his fitness or capacity to practice law," citing this Court's opinion in *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). (Brief of Florida Board of Bar Examiners at 3). Consequently, the Board offered two arguments in support of Item 28(b). First, an inquiry into essentially all past psychological consultations was justified because of "the compelling state interest in assuring that persons admitted to the Bar are fit in all respects to practice law in this state." (Brief of Florida Board of Bar Examiners at 4). Since members of The Florida Bar must be fit *in all respects,* all aspects of their psychological makeup, no matter how intimate and unrelated to law, were fair game for investigation. Second, the applicant necessarily waived her psychotherapist-patient privilege when she applied for membership in the Bar and placed her

mental condition at issue. The Board made no attempt to suggest that Item 28(b) was narrowly drawn to be the least intrusive means of serving the compelling state interest in fitness, and instead argued that its duties allowed it complete and unfettered discretion to "determine what information [was] related to fitness to practice law." (Brief of Florida Board of Bar Examiners at 4).

In essence, the Board argued that, because it was the arbiter of relevance, it could ask applicants whatever it chose; it thus had the right to force even the unnecessary waiver of the psychotherapist-patient privilege. In fact, the Board argued, the waiver was automatic. All psychological consultations were "relevant." Therefore, the applicant could be considered to have put her entire psychological counseling history "in issue" and waived her privilege simply by applying for membership in The Florida Bar.

C. The Decision Of The Florida Supreme Court.

Robertson's case was pending in the Florida Supreme Court fully briefed (but never argued) for 28 months. In the interim, another case also challenging Item 28(b) arose. On November 3, 1983, the Florida Supreme Court issued a full opinion in that case, *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71 (Fla. 1983), ("*Board of Bar Examiners I*") and, one week later, summarily decided the case of Mary Anne Robertson. In a *per curiam* order, the Florida Supreme Court denied Robertson's petition for review:

> Petition for review is denied. *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71 (Fla. 1983).
>
> It is so ordered.

(A. 1).

Without argument and without opinion except for its citation to *Board of Bar Examiners I*, the Florida Supreme Court simply closed the file on Mary Anne Robertson. *In Board of Bar Examiners I*, the court held the Board's actions had met "even the highest standard of the compelling state interest test." 443 So.2d at 74. (A. 12). The state bore "a heavy burden of justification" but its "interest in insuring that only those fit to practice law [were] admitted to the Bar" nevertheless merited the intrusion of the challenged inquiry. *Id.*

The Florida Supreme Court reached its startling conclusion without ever considering the *possibility* that less intrusive alternatives to the all-encompassing Item 28(b) might exist. The court summarily dispensed with the idea that the inquiry could effectively be limited in time or scope. It neither considered ways in which to limit Item 28(b) to the discovery of material actually relevant to fitness, nor explored the problems raised by the breadth of the current inquiry.

In fact, the court's opinion appears but to mirror the confusion inhering in the Application and release form. Within a single paragraph, the court notes (1) that no "precise list" of relevant medical conditions is possible and (2) that the applicant need not worry because the psychological release form she signs is "limited to information *relevant*" to fitness. How the Board is able to determine relevance in the latter instance and not in the former is never considered by the court. 443 So.2d at 76. (A. 14-15).

A single Justice dissented from the court's opinion in both *Board of Bar Examiners I* and Robertson's case. He disagreed with the majority, and agreed with Robertson, on the crucial point: the existence of, and need for, less intrusive alternatives to Item 28(b). The Board's inquiry

was particularly and unnecessarily intrusive in an area that called for the greatest sensitivity. Thus, the justice suggested limiting Item 28(b) in time and scope to make it more relevant to the subject of the Board's legitimate concern: the applicant's fitness to practice law. 443 So.2d at 77. (A. 17-18).

D. The Petition For Rehearing.

On November 28, 1983, Robertson timely filed a petition for rehearing, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure. She argued that the Florida Supreme Court had misapprehended applicable constitutional doctrine concerning the use of "least intrusive means" and had failed to consider the ample array of other means available to the Board. In her petition, Robertson suggested a number of obvious alternatives to Item 28(b) that the Florida Supreme Court might adopt which would be less intrusive and still serve the compelling state interest recognized by the court. See *infra* at p. 25.

In response, the Board erroneously argued only that Robertson's petition was not timely and that the alternatives suggested therein had all been argued to the court by Robertson before. On February 9, 1984, the Florida Supreme Court, without explanation, simply denied Robertson's petition for rehearing just as months before it had denied her petition for review. (A. 2).

REASONS FOR GRANTING THE WRIT

I. ITEM 28(b) VIOLATES BAR APPLICANTS' RIGHT TO PRIVACY BECAUSE IT GRATUITOUSLY INTRUDES INTO, AND REQUIRES DISCLOSURE OF, HIGHLY INTIMATE PSYCHOLOGICAL CONSULTATIONS.

A. The Decisions Of This Court Explicitly Recognize A Right To Privacy Which Limits Access To The Information Sought In Item 28(b).

The federal constitutional right to privacy recognized by this Court has at least three distinct facets. The first is the right of the individual to be free in her private affairs from governmental surveillance and intrusion. *E.g., Katz v. United States,* 389 U.S. 347 (1967); *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled, Berger v. New York,* 388 U.S. 41 (1967), *overruled, Katz v. United States, supra.* The second is the right of the individual not to have her private affairs disclosed to the public. *E.g., Nixon v. Administrator of General Services,* 433 U.S. 425 (1977). Finally, the right includes the individual's freedom to make certain intimate decisions free of governmental interference. *E.g., Roe v. Wade,* 410 U.S. 113 (1973); *Griswold v. Connecticut,* 381 U.S. 479 (1965). *See generally* T. Gerety, *Redefining Privacy,* 12 Harv.Civ.R.-Civ.Lib.L.Rev. 233 (1977).

In this case, all three strands of the privacy right are implicated. With Item 28(b), the State intrudes into what has traditionally been regarded as one of the most private of relationships, that between a psychotherapist and his patient. *See* § 90.503(2), Florida Statutes (psychotherapist-patient privilege). Psychological consultations

inherently involve the most intimate private facts. Yet The Florida Bar applicant is required both to disclose the nature of her consultations and to waive the privilege itself, without regard to the actual relevancy of the consultations. Thus, whether they relate to past marital or sexual problems, depression, or the trauma of losing a family member, disclosure and waiver are required. Even when such problems are immaterial to the applicant's fitness to practice law, and despite the fact that practicing lawyers are themselves under no obligation to make such disclosures to the Bar, applicants must make an unconditional disclosure of such matters. Moreover, no matter how remote in time the consultation Item 28(b) requires the applicant to divulge its content.

The case of Robertson is illustrative. Robertson had been a nun. Years later, when "mildly depressed," she sought the counseling of a qualified psychiatrist. She was helped to realize she was in a transitional phase in her life and needed a change; she decided to attend law school. Robertson's counseling thus concerned a very private part of her life. A decision of such intimacy to the individual can be of no legitimate concern to the Florida Board of Bar Examiners. There is no reason Item 28(b) need be written so broadly that it encompasses counseling for problems such as frigidity, impotency, rape trauma, and the like, which are so intimate to the applicant and so irrelevant to the Board's proper function.

Item 28(b) also impinges on the disclosural privacy right. The question forces the applicant to disclose clearly private facts to the Board of Bar Examiners without sufficient guarantees that the information disclosed will remain "confidential". This Court has held properly limited disclosure of private facts constitutional but the disclosure

here is not so limited. *E.g., Nixon v. Administrator of General Services, supra; Whalen v. Roe,* 429 U.S. 589 (1977). In holding the screening by archivists of Mr. Nixon's presidential papers proper, the *Nixon* Court focused particularly on the fact that no less intrusive alternative to the comprehensive screening existed, noting further that the archivists were professionals with a reputation for discretion. Here, in contrast, there is no suggestion that any attempt has been made to narrow the breadth of the required disclosure. Item 28(b) certainly betrays no evidence of fine-tuning. Moreover, the Board, with all due respect, is not composed of a group of independent specialists whose silence may be presumed. Its members are attorneys and lay people appointed by the Florida Supreme Court from a pool of individuals recommended by the Board of Governors of the Florida Bar and by the Board itself. Article I, Sections 2 & 3, Rules of the [Florida] Supreme Court Relating to Admissions to the Bar. There is no provision for sanctions should a Board member (lacking corrupt intent) improperly disclose confidential information. Sections 839.25 and 839.26, Florida Statutes. Indeed, strict confidentiality is not even promised. The Board is authorized to disclose information concerning an applicant in certain enumerated circumstances. Article I, Section 14, Rules of the [Florida] Supreme Court Relating to Admissions to the Bar.

Finally, Item 28(b) impinges on the applicant's right to decisional autonomy. The knowledge that intimate facts will have to be disclosed if (i) counseling is sought and (ii) one intends to apply for membership in The Florida Bar interferes with an applicant's private decision-making in either of two ways. Given the certainty of ultimate disclosure, a potential applicant may choose simply to forego needed counseling or treatment. Such a de-

cision, forced by Item 28(b), could have substantial ramifications in the individual's life. In this case, counseling helped Robertson make a drastic change in her life. Without the help of psychological counseling, she might have been unable to identify what troubled her and thus never have made the decision to enter law school.

Alternatively, the potential applicant may choose instead to forego the practice of law in Florida rather than disclose facts concerning past consultations. Thus, in the name of "fitness", Item 28(b) successfully encourages troubled individuals who need help not to seek it and discourages those who may have sought help, and so benefited, from practicing law in Florida. Whether such is its conscious intent, Item 28(b) serves as an improper barrier to entry into the legal profession.

B. The Decisions Of This Court Explicitly Hold That Regulations Which Impinge On The Privacy Of The Individual Must Be "Reasonably Designed" To Further A Compelling State Interest In Order To Be Valid.

The right to privacy is not absolute. The Board of Bar Examiners is charged by the Florida Supreme Court with ensuring that applicants for membership in the Bar are qualified and fit in all respects to practice law. Certain inquiries *must* be made; all states request information from applicants indicative of proper moral and psychological fitness and character. The difficulty with Item 28(b) is that it is excessively intrusive, gratuitously violating an applicant's privacy by requesting irrelevant but highly intimate personal facts. It is the overreaching character of Item 28(b) that renders it constitutionally defective. As

this Court ruled last Term in *City of Akron v. Akron Center For Reproductive Health, Inc.*, 51 U.S.L.W. 4767, 76 L.Ed.2d 687, 103 S.Ct. 2481 (1983), when a privacy right is at stake:

> [T]he existence of a compelling state interest . . . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest.

51 U.S.L.W. at 4772.

Thus, in *City of Akron*, the Court invalidated the provisions of an Akron, Ohio, ordinance which required hospitalization for all second-trimester abortions. The State, the Court found, had not made a "reasonable effort to limit the effect of its regulations" to serving the particular state interest at issue. This case, like *City of Akron*, involves a state that has made no attempt to "tailor" its regulation to serve the compelling state interest involved and yet minimize the intrusion into the purely personal life of the individual. Instead, the Florida Board of Bar Examiners has chosen to employ the *most* intrusive of means in its screening of applicants.

Such overbroad intrusion is needless and aberrant. Less intrusive alternatives are employed, apparently without ill effect, in virtually every other state. Indeed, only two states, Delaware and South Carolina, currently employ the overbroad and insensitive method of inquiry used by Florida. Item 28(b) could be easily amended without thwarting the state's necessary "character and fitness" investigation. Applications from other states present a broad spectrum of possibilities. For instance, Florida could, at a minimum, qualify Item 28(b), as have several other states which ask essentially the same question, by recognizing the following exceptions:

> You may omit isolated instances of consultation for conditions of emotional stress or short term counseling for marital problems.

Colorado Bar Application, Question 28 (excerpt). *See also* Georgia Bar Application; North Carolina Bar Application. (Supp. App.) A modification of this type at least eliminates the need for the disclosure of counseling such as Robertson's.

But Florida's inquiry can and should be, as it is in most states, even less intrusive. At this writing, counsel is aware of four states which ask no questions relating to past psychological consultations.[8] These states rely on investigations into the applicant's present character and fitness. Ironically, Florida also requires the applicant submit to one of the nation's most extensive investigations of present character and fitness of applicants. This investigation routinely requires six to eight months to be completed and involves interviews with friends, neighbors, teachers, associates and employers of the applicant, and any other individuals who would be likely to know whether the applicant was mentally "fit" to practice law. Alternatively, nine states limit their inquiries to whether the applicant has ever been adjudicated mentally incompetent.[9] Four states ask only whether the applicant has ever been institutionalized[10] and ten inquire into *both* legal incompetence and institutionalization.[11] Of the remaining

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8. These include California, Indiana, Kentucky and New Hampshire. (Supplemental Appendix, to be filed).

9. The District of Columbia, Idaho, Illinois, Massachusetts, Nebraska, Rhode Island, Tennessee, Virginia and Wyoming ask *only* whether the applicant has been judicially declared incompetent. (Supplemental Appendix, to be filed).

10. Louisiana, Maryland, New Jersey, West Virginia ask *only* whether the applicant has been institutionalized. (Supplemental Appendix, to be filed).

11. Arizona, Kansas, Iowa, Michigan, Missouri, New Mexico, New York, South Dakota, Utah, Vermont, ask *both*. (Supplemental Appendix, to be filed).

eighteen states, those surveyed by counsel all pose questions more limited in scope than Florida's Item 28(b).[12] In this way, many states restrict their inquiry to the treatment of mental disorders which might plausibly have some bearing on the applicant's present fitness to practice law.

Robertson suggested still other options in her rehearing petition. Florida could limit its inquiry to a relevant time period, requiring disclosure only of consultations in the five years immediately preceding application, unless the investigation into the applicant's present character and fitness revealed the presence of psychological problems. Alternatively, the Board could limit the substantive scope of the inquiry by promulgating a list of matters it deemed irrelevant and thus which applicants would not be required to disclose. Still another possibility would be to promulgate fitness criteria and to delegate the relevancy determination and possible disclosure to the professional discretion of the applicant's psychotherapist.

Any survey of the alternative means available, including those employed by other states, indicates that Florida's Item 28(b) is far too broadly drawn. The compelling state interest in choosing a competent Bar will not support so intrusive an inquiry when important privacy rights are at stake and less intrusive alternatives are so readily available.

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12. Eight of these states—Alabama, Arkansas, Maine, Minnesota, Nevada, North Dakota, Ohio and Oklahoma—ask whether the applicant has received "treatment" for "mental illness" or "disorder." Two—Mississippi and Washington—ask a similar question but restrict it further with a five-year time limitation. Still another—Alaska—limits its inquiry to treatment "bearing on fitness." (Supplemental Appendix, to be filed).

The inquiries conducted by those states not specifically mentioned here will be reported in the Supplemental Appendix counsel intends to file when its survey is complete.

C. The Decision Of The Florida Supreme Court Requiring A Bar Applicant To Disclose All Prior Psychological Consultations Unconstitutionally Burdens The Qualified Applicant's Right To Practice Law.

More than the potential applicant's right to privacy is at stake. Also at issue is her right, if she is otherwise qualified, to practice law. It is well settled that when government chooses to offer a benefit which it might otherwise withhold entirely, it must do so in a manner that does not needlessly chill the exercise of some constitutional right. *See generally,* Note, *Another Look at Unconstitutional Conditions,* 117 U.Pa.L.Rev. 144 (1968). It may not, for example, condition the receipt of a welfare benefit on the sacrifice of a First Amendment right to practice one's religion. *Sherbert v. Verner,* 374 U.S. 398 (1963).

It is thus no answer here for the Supreme Court of Florida to state that the practice of law in Florida is a "privilege" that may be granted or withheld as the state chooses. *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71, 74 (Fla. 1983). For an otherwise qualified applicant, the practice of law is a *right,* just as a welfare benefit is a right for the individual otherwise entitled to it. *See, e.g., Baird v. State Bar of Arizona,* 401 U.S. 1, 8 (1971). The Florida Board of Bar Examiners cannot force the applicant to exchange her constitutionally guaranteed right to privacy for the privilege of law practice when the exchange is needless. *See United States v. Jackson,* 390 U.S. 570, 582 (1968) (However proper a legislative objective may be, it can not "be pursued by means that needlessly chill the exercise of basic constitutional rights."); *see also In re Stolar,* 401 U.S. 23, 30 (1971) (question at issue "could hardly have been necessary for a State interested only in whether [the applicant] would make an honest lawyer faithful to his clients").

II. REVIEW OF THIS CASE IS OF FUNDAMENTAL IMPORTANCE.

This Court has a special duty and responsibility to superintend access to membership in the legal profession. This role becomes even more compelling when the construction of federal rights is implicated by restrictions on Bar membership or the means employed to determine fitness for the Bar. The Rules of the Florida Supreme Court Relating to Admissions to the Bar require, as do the rules of other states, that applicants produce, "satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession." Article III, Section 2. Unlike most other states, however, Florida has chosen to implement this requirement with an application question, Item 28(b), which needlessly and destructively intrudes upon the federal privacy right of applicants. Such a question cannot be permitted to stand when so many better and less intrusive alternatives exist from which Florida may choose.

As Justice Brandeis noted, "one of the happy incidents of the Federal system" is that the states may serve as laboratories in which "novel social and economic experiments" may be tried. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Indeed, the broad spectrum of inquiries made in the bar fitness area by the states is evidence of the vitality and creativity of that system. Yet, on occasion, an experiment may fail. It is then the essential function of this Court to intervene and right the error. Florida's Item 28(b) is such a failed experiment. This Court should act now to strike down the question and provide the Bars of all states badly needed guidance regarding the limits the federal right to privacy places on inquiries into the past psychological counseling of bar applicants.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Florida Supreme Court should be granted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served May 9, 1984 in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

C. Graham Carothers
Post Office Box 391
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/s/ PARKER D. THOMSON